

In the Matter of

Distribution of 1995, 1996, 1997
and 1998 Digital Audio Recording Funds

Docket No. 99-3 CARP DD 95-98



ORDER

The Library of Congress has before it a Motion for Leave to Accept a Late-Filed Notice of Intent to Participate ("Motion") filed by Alicia Carolyn Evelyn ("Evelyn") on July 14, 1999, in the above-captioned proceeding. Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, SESAC, Inc., the Harry Fox Agency, the Songwriters Guild of America, and Copyright Management, Inc. (collectively, the "Settling Parties") oppose the Motion.¹

LIBRARY
OF
CONGRESS

On May 4, 1999, the Library published a Notice in the Federal Register directing those parties who had filed claims for royalty fees collected in the Musical Works Fund for 1995, 1996, 1997 and 1998 for the distribution of digital audio recording devices and media to submit comments as to whether controversies existed for the distribution of those funds. 64 FR 23875 (May 4, 1999). In addition, the Library requested those claimants wishing to participate in the distribution proceeding for the Musical Works Fund to file a Notice of Intent to Participate. Comments on the existence of controversies and Notices of Intent to Participate were due by July 6, 1999.

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The Library has stated on numerous occasions that a Notice of Intent to Participate is a sine qua non to a royalty distribution and that failure to submit a timely Notice "may preclude a party from participating in [a] distribution." 64 FR at 23876. Complete failure to file a Notice results in dismissal of a claim. See, e.g. Order in Docket No. 95-1 CARP DD 92-94 (September 18, 1995). A late-filed Notice is evaluated under a two-part test: 1) the disruption to the proceeding caused by allowing the moving party to participate; and 2) good cause for accepting the late-filed Notice. Order in Docket No. 96-6 CARP NCBRA (July 30, 1997). Disruption to the proceeding is considered according to the amount of prejudice caused to the other parties by allowing the moving party into the proceeding--such as its impact on settlement negotiations or preparation of written direct cases--as well as the impact on the Library's preparation for the arbitration proceeding. Good cause is evaluated according to several factors, including the harm caused by denying the late-filed Notice, the soundness of the reasons offered by the moving party as to why the Notice was late, and the moving party's prior record for timely complying with Library filing requirements. In circumstances where

¹ Evelyn filed a reply to the Settling Parties opposition on August 4, 1999. The reply was due on July 30, and was not accompanied by a motion to accept a late-filed pleading. Consequently, Evelyn's reply was not considered in this Order.

the likelihood of prejudice to the parties is cognizable and significant, the burden is on the moving party to make a strong showing of good cause.

The Settling Parties assert that acceptance of Evelyn's late-filed Notice of Intent to Participate would cause them prejudice. In support of this assertion, the Settling Parties submit that they "have already engaged in substantive settlement discussions with all of the parties in this proceeding that timely filed Notices of Intent to Participate," and note that Evelyn has not responded to a June 22, 1999, letter from SESAC requesting her to discuss settlement which "prejudice[s] their efforts both to reach a global settlement and, if necessary, to prepare their direct cases." Settling Parties Opposition at 4. The Settling Parties also submit that Evelyn's comments on controversies, filed with her Notice of Intent to Participate fail to identify the years and subfunds in which Evelyn has a controversy with the Settling Parties.

The Library considers the prejudice caused the Settling Parties by accepting Evelyn's late-filed Notice to be minimal. There is no assertion that substantial settlement negotiations occurred between July 6 and July 14, nor is there an assertion that time and effort were expended during this short period in the preparation of their case. Evelyn's failure to identify the years and subfunds in controversy has also not appeared to cause the Settling Parties any significant prejudice at this time. With regard to the Library, there is no disruption to the scheduling of this proceeding, or the preparation for arbitration.

The presence of good cause for accepting the late-filed Notice is more problematic. Evelyn was certainly aware of the July 6 filing date, having received a copy of the May 4 Federal Register notice from SESAC on June 22, 1999. Furthermore, the burden was on Evelyn, and all participants in a CARP proceeding, to track the filing deadlines established by the Library in CARP proceedings.

Evelyn offers several reasons for missing the July 6 deadline, including a misapprehension that she had previously filed her Notice, family problems, out-of-town guests and tax difficulties. It appears to the Library that Evelyn essentially forgot the July 6 filing deadline. Normally, an assertion of absentmindedness in and of itself is not a showing of good cause. Evelyn, however, recognized her error quickly and filed a motion for leave to file late only eight days after the deadline, thereby reducing the likelihood of prejudice to the other parties caused by the delay.

Furthermore, the Library notes that this is the first time Evelyn has failed to file a timely Notice. The Library is well aware of the Settling Parties' warning that its filing deadlines in a CARP proceeding must not be taken lightly, and a history of ignoring or missing such deadlines is certainly grounds for dismissal.

Finally, and most importantly in this case, the Library notes that this proceeding involves the distribution of four years of royalties from the Musical Works Funds. Denial of Evelyn's late-filed Notice increases the harm to Evelyn significantly, as opposed to a proceeding involving distribution of only one year's worth of royalties. Consequently, the Library determines that sufficient cause exists to accept Evelyn's late-filed Notice.

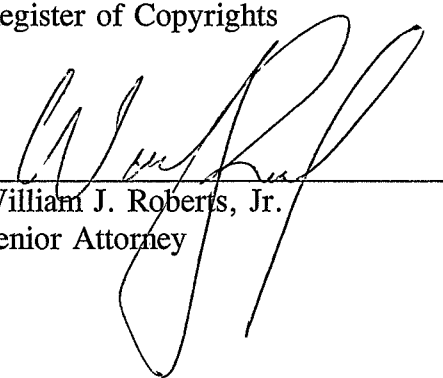
In accepting Evelyn's late-filed Notice, it must be pointed out that Evelyn did not comply with the directions of the May 4 Federal Register notice to identify the subfunds and the years in which Evelyn has a controversy. She is, therefore, directed to amend her comments by August 20 to comply with those directions. It is also expected that Evelyn will negotiate in good faith with the Settling Parties in an effort to reach a potential settlement agreement.

Wherefore, **IT IS ORDERED** that Evelyn's Motion to Accept Late-Filed Notice of Intention to Participate **IS GRANTED**, and **IT IS FURTHER ORDERED** that Evelyn shall amend her comments on controversies by August 20 to identify the years and subfunds in which she claims controversies to exist.

SO ORDERED.

Marybeth Peters
Register of Copyrights

By:



William J. Roberts, Jr.
Senior Attorney

Dated: August 5, 1999